

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 28 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JESSE VON BERCKEFELDT,

Petitioner - Appellant,

v.

GUY HALL, Superintendent, Two Rivers
Correctional Institution,

Respondent - Appellee.

No. 05-35920

D.C. No. CV-02-00927-CO

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding

Argued and Submitted July 24, 2006
Portland, Oregon

Before: REINHARDT and GRABER, Circuit Judges, and LEW,** District Judge.

Jesse Von Berckefeldt appeals the denial of his petition for a writ of habeas corpus. He argues that he was denied effective assistance of counsel at trial and that the admission of a witness's testimony regarding an incident unrelated to the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Ronald S.W. Lew, United States District Judge for the Central District of California, sitting by designation.

the charges against him violated his due process rights. We affirm the denial of the habeas petition.

First, Von Berckefeldt does not show that his attorney was ineffective in failing to locate a witness to the shoot-out. Counsel and his investigator made a reasonable effort to locate the witness, who had fled the state and was concealing her whereabouts. Further, Von Berckefeldt was not prejudiced by counsel's inability to locate the witness because her testimony would have been cumulative and because, given her prior contradictory statements, it is not clear that she would have testified in the manner Von Berckefeldt asserts. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). Second, trial counsel's decision not to object to the prosecutor's closing argument did not constitute ineffective assistance because the prosecutor made no "egregious misstatements." *See United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993). Von Berckefeldt also does not show that he was prejudiced by his attorney's decision.

Von Berckefeldt's due process claim is not procedurally defaulted because the state court decision denying the claim affords no basis for determining whether it did so on state procedural grounds. *See Koerner v. Grigas*, 328 F.3d 1039, 1052 (9th Cir. 2003). Nevertheless, the claim fails on its merits because the testimony to

which Von Berckefeldt objects did not render his trial fundamentally unfair. *See McKinney v. Rees*, 993 F.2d 1378, 1380 (9th Cir. 1993).

For the foregoing reasons, the district court's decision denying Von Berckefeldt's petition for a writ of habeas corpus is **AFFIRMED**.